IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.789 OF 2005

Sohanlal Poonamchand Jain ..Appellant

Versus

Amol Chandrashekhar Tungatkar & Ors. ..Respondents

Mr.Ashok M.Garud for appellant

Mr.Jaydeep S.Deo for respondent Nos.1 and 2.

CORAM : P.V.KAKADE, J.

DATE : 29TH AUGUST, 2005

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by Adhoc Addl. District Judge, Pune dated 24th January 2005 dismissing the appeal and confirming the judgment and order passed by Civil Judge, Junior Division, P.M.C.Court,Pune dated 16.7.2002 decreeing the suit with direction to defendant No.1 to hand over vacant possession of the land admeasuring 43 sq. mtrs. out of plot no.2 of the

layout plan Exh.34 by removing construction made by him on the said land within two months from the date of the order of the said Court.

2. I have heard the learned counsel for both the parties. Perused the record.

3. The plaintiff filed the suit for vacant possession by removing the encroachment and construction made by defendant no.1 on the property bearing Plot No.21 of the land Survey No..11 and for also mandatory injunction directing the defendant corporation to enforce legal action for demolition of unauthorised construction. The plaintiff came with the case that the property bearing Survey No.11 and their part are owned by Seema Sagar Society, which is a registered society under the relevant laws. The said Society has made lay out plan of said property. Plot no.21 was allotted to the Plaintiff’s father, being the member of the said society. Thereafter, the said plot was allotted and transferred in the name of Plaintiff by passing appropriate resolution in the year 1997. Plot No.21 admeasuring 3000 sq. ft. It is alleged by the plaintiff that defendant no.1 made encroachment in the

said plot to the extent of 463 sq. ft. at northern portion of the plot and made unauthorised construction on open space of the society adjoining to Plot No.21 in the year 1993 and accordingly, the defendant no.1 made encroachment on the open premises of the society as well as plot no.21 to the extent of 463 sq. ft. i.e. 43 sq. mtr. and hence the suit for removal of such encroachment and unauthorised construction came to be filed. The defendants contested the suit, inter alia, denying the allegations made by the plaintiffs. It is the contention of the defendant no.1 that he had purchased 4.5 Are land out of land of Survey No.10 Hissa No.29, 75 and 90 of village Katraj. He had purchased the said property under the Registered Sale Deed dated 31.5.1989 from one Surana. The plaintiff is having workshop in the said property and according to the defendant he has never made any encroachment in the suit property and sought dismissal of the suit.

. The learned trial judge adjudicated the dispute on merits and came to the conclusion that the plaintiff had proved that the defendant no.1 made encroachment on the plot no.21 as alleged and therefore the plaintiff was entitled to possession of suit premises by removing

construction thereon and as such the suit came to be decreed. The appeal was carried to the District Court. The learned Addl. District Court after hearing both the parties came to the conclusion that the findings recorded by the learned trial judge on the basis of available evidence were legal and proper and therefore, dismissed the Appeal. Hence the present appeal.

4. At the outset it may be noted that there is absolutely no substantial question of law involved in this appeal. The only point sought to be raised on behalf of the appellant is to the effect that the learned trial judge did not consider the original village map, which was sought to be brought on record, and put reliance on the Cadastral Survey Map, which was drawn consequent upon the City Survey effected after the concerned village was included in the boundaries of the Municipal Corporation, Pune. Therefore, it was submitted that by virtue of provision of Order 18 Rule 17 of the Civil Procedure Code, it was the duty of the trial court to recall the witness for the purpose of cross-examination of the concerned Cadastral Surveyor, who was examined as a witness, in order to put him to cross-examine in respect of village map drawn earlier

before the village was included in the Municipal Corporation area. In this regard it must be noted that the City Survey map drawn by the Cadastral Surveyor is later in time and which is duly proved by the plaintiff examining the Cadastral Surveyor as a witness and the map clearly shows the encroachment, as alleged by the plaintiff, to the extent as alleged, and also it is found that the defendant no.1 has made construction on encroached portion. It is needless to mention that when Cadastral Survey was prepared and City Survey map came into force the village map has merged therein and all rights of the parties involved in the properties on the basis of village map would be governed by the subsequent City Survey, which in this case shows that encroachment is proved.

5. The Apex Court in the case of **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar** reported in **(1999) Supreme Court Cases 722** has categorically laid down that it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at,by the last court of fact, being the first appellate court. In a case where from a given set of circumstances two inferences are possible, one drawn by

the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. This rule is especially applicable when both the courts below have concurrently found that the issues of facts involved in the dispute are properly appreciated on the basis of available evidence and there is absolutely no perversity involved in such appreciation, and as such I hold that no interference is called for in the present appeal. In the result appeal stands dismissed with no order as to costs.

. Certified copy is expedited.